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IN THE

Supreme Court of the United States

WORLDCOM, INC., *et al.*,
Petitioners,

v.

VERIZON COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

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WorldCom, Inc., The Association for Local Telecommunications and Competitive Telecommunications Association ("Petitioners") hereby submit this reply in support of their petition for a writ of certiorari, filed October 10, 2000.

1. With respect to the first issue presented – the Eighth Circuit's invalidation of a portion of the FCC's network element pricing rule – Verizon does not dispute that this Court should grant review. Thus, every party to have responded agrees that the petitions filed by the Petitioners, the FCC, and AT&T on this point should be granted. Accordingly, the Court should grant review of the Eighth Circuit's decision invalidating 47 C.F.R. § 51.505(b)(1).

2. In our petition, we demonstrated that this Court should also grant review of the Eighth Circuit's decision invalidating 47 C.F.R. § 51.315(c)-(f) – the FCC's "additional combinations" rules. We explained that review is warranted because: 1) there is a conflict between the Eighth and Ninth Circuits with respect to whether the Act precludes imposition of such a requirement; 2) the Eighth Circuit's decision conflicts directly with this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); and 3) competition will be seriously harmed if incumbent local exchange carriers refuse to provide elements in combination. Verizon does not seriously challenge any of these points.

a. Verizon does not dispute that a conflict between the Eighth and Ninth Circuits exists. Nor could it – there is a clear and acknowledged conflict between these two courts over whether the Act prohibits a requirement that elements not already provided in combination be combined upon request.[1/]

1/ The Ninth Circuit held, relying on this Court's decision in *AT&T*, that "requiring U.S. West to combine unbundled network elements is not inconsistent with the Act . . . because the Act does not say or imply that network elements may only be leased in discrete parts." *US West Comm. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000). In its decision on remand, the Eighth Circuit acknowledged the Ninth Circuit decisions, but announced that it did not

(continued...)

Instead, Verizon suggests that this conflict will somehow "dissipate" without intervention from this Court. That suggestion is clearly wrong. Verizon first suggests that the Ninth Circuit might reverse itself in the wake of the Eighth Circuit's reinvalidation of Rules 315(c)-(f), either because the Ninth Circuit will choose to follow the Eighth Circuit, or because it will believe itself bound to do so by the Hobbs Act. But the Ninth Circuit has made clear that it will not do so. At the time it issued its decision, the Ninth Circuit had before it the Eighth Circuit's first decision striking down Rules 315(c)-(f). Its disagreement with the Eighth Circuit's determination was clear and unequivocal. *See MCI Telecomms. Corp. v. U.S. West Comm.*, 204 F.3d 1262, 1268 (9th Cir. 2000) ("the Eighth Circuit's interpretation of the Act was incorrect"), *cert. denied*, No. 00-214, 2000 WL 1202088 (U.S. Nov. 13, 2000). There is no realistic prospect that the Ninth Circuit will reconsider this decision simply because the Eighth Circuit has again announced its view that Rules 315(c)-(f) are inconsistent with the Act's language.[2/] To the contrary, only last month – well after the Eighth Circuit's decision – the Ninth Circuit sanctioned a state commission's decision to require the

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1/ (...continued)
agree "with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule." Pet. App. 21a. Instead, the court below concluded, contrary to the Ninth Circuit's view, that the Act precludes imposition of such a requirement.

2/ In the wake of the Eighth Circuit's decision, the Fifth Circuit has agreed with the Ninth Circuit. In upholding a challenge to an "additional combinations" provision, the Fifth Circuit concluded that "there is nothing 'illegal' about the provision requiring SWBT to combine network elements for Waller or any other CLEC. Nothing in the Telecommunications Act forbids such combinations." *Southwestern Bell Tel. Co. v. Waller Creek Comm., Inc.*, 221 F.3d 712, 821 (5th Cir. 2000). The court expressly declined to reach the issue of whether the Eighth Circuit's decision was correct, concluding that it means only that a combinations requirement is no longer "required by law." *Id.* Thus, the Eighth Circuit's decision is now in conflict with those of two courts of appeals.

provision of combinations consistent with Rules 315(c)-(f) as "clearly valid under our decisions in *MCI Telecommunications* and *MFS Intelenet*." *US West Comm., Inc. v. Hamilton*, No. 99-35586, 2000 WL 1568707, at *1 (9th Cir. Oct. 23, 2000) (citations omitted).

Nor is there any prospect that the Ninth Circuit will feel bound to conform its decision to the Eighth Circuit's in light of the Hobbs Act. Indeed, in its first decision, the Ninth Circuit acknowledged that "[t]he Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack." *MCI Telecomms. Corp.*, 204 F.3d at 1268.[3/] But in the Ninth Circuit's view, that means only that federal law "does not currently *mandate* a provision requiring combination." *Id.* (emphasis added). That does not answer the independent question "whether a provision requiring combination *violates* the Act." *Id.* (emphasis added). Because "[t]he Supreme Court's interpretation of the Act makes absolutely clear that it does not," the Ninth Circuit held, the additional combinations provision under review must be upheld as consistent with the 1996 Act. *Id.* Thus, it is clear that the Ninth Circuit disagrees with Verizon's view of the Hobbs Act, and will not reconsider its decision in light of the Eighth Circuit's decision on remand.[4/]

3/ This decision was issued after this Court had decided *AT&T*, and after the Eighth Circuit had indicated it would not reinstate Rules 315(c)-(f), but would reconsider the issue on remand.

4/ In any event, Verizon misstates the scope of the Hobbs Act. Under Verizon's view, the Hobbs Act not only vests a single court of appeals with the ability to review a regulation, but grants the Hobbs Act court sole authority to interpret the 1996 Act to the exclusion of its sister courts of appeals. But no court has ever construed the Hobbs Act to mean that if a Hobbs Act court happens to engage in statutory construction in the process of "determin[ing] the validity of" a Commission order, 28 U.S.C. § 2342, it thereby gains exclusive power to construe the underlying statute.

Verizon also suggests that the conflict will "dissolve without this Court's intervention" because the FCC will promulgate a binding rule incorporating the Eighth Circuit's decision. Verizon Opp. at 19. That suggestion is similarly off the mark. If the Eighth Circuit's decision stands, Rules 315(c)-(f) would be void, and no regulation would exist that would need to be "conformed." In that event, interconnection agreements that are brought before federal courts in the Ninth and Fifth Circuits will be subject to controlling federal standards that directly conflict with the controlling federal law in the Eighth Circuit.

b. Presumably because such a clear conflict exists – and because there is no prospect that it will dissipate on its own – Verizon urges this Court to deem the issue waived. Verizon Opp. at 13-14. That argument is baseless.

As an initial matter, Verizon's assertion that the issue of the validity of Rules 315(c)-(f) was not presented to this Court on review of the first Eighth Circuit decision is incorrect.[5/] More importantly, whether this issue was squarely presented at that time is not of consequence. After this Court's *AT&T* decision was released, the interexchange carriers argued to the Eighth Circuit that whether or not the validity of Rules 315(c)-(f) had been raised before this Court, the Eighth Circuit was free to reconsider any issue called into question by this Court's decision. *See* Intervenors' Response to Local Exchange Carriers' Motion Regarding Further Proceedings on Remand, *Iowa Utils. Bd. v. FCC*, No. 96-3321, at 13 (8th Cir. filed Mar. 9, 1999). The Eighth Circuit agreed, expressly requesting

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5/ The briefs that were filed by AT&T and others not only challenged the Eighth Circuit's jurisdictional holding, Petition for a Writ of Certiorari, *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826, at 18 (U.S. filed Nov. 17, 1997), but also argued that the court had erroneously failed to apply the substantive standards of § 201(b) in invalidating Rules 315(c)-(f). *Id.* at 13; *see also* Brief of Petitioners AT&T *et al.*, *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826, at 32-34 (U.S. filed April 3, 1998).

briefing on whether, in light of this Court's decision, it should alter its prior decision with respect to Rules 315(c)-(f). Order, *Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir. filed June 10, 1999). That issue was fully briefed and argued and decided by the court. In its decision, the Eighth Circuit did not even remotely suggest that petitioners had waived their challenge by failing to raise it in the prior petition for certiorari. To the contrary, the court issued a ruling on the merits, rejecting the arguments of the FCC and its supporting intervenors that its prior "decision to vacate rules 51.315(c)-(f) was predicated on language rejected by the Supreme Court," Pet. App. 21a, and that "the policy concerns of ensuring against an anticompetitive practice not only support 47 C.F.R. § 51.315(b) but also subsections (c)-(f)." *Id.* It is that decision that the FCC, WorldCom and AT&T have challenged in their petitions.

The assertion that our ability to do so was somehow waived is specious. As this Court's rules make clear, granting review is appropriate where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10.1(c). The Eighth Circuit has now done so. The assertion that the Eighth Circuit's most recent decision is nonetheless unreviewable is simply untenable.

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961) is not to the contrary. In that case, this Court did not purport to adopt a broad general rule, but instead based its decision on the unique facts presented there. In particular, the Court declined to hear the Communist Party's challenge to a decision of the Subversive Activities Control Board where an identical ruling on the same issue could have been raised in an earlier petition for certiorari but was not. *Id.* at 29-30. In doing so, the Court emphasized that nothing had changed in the five years since the first challenge had been brought. Moreover, had the Communist Party raised the issue when it had first arisen, the

need to decide the constitutional questions raised in the first petition could have been avoided. For these reasons, this Court held that review was inappropriate.

This case does not present the unique facts presented in *Communist Party*. Here, the validity of the combinations rules was raised initially before the Eighth Circuit. On review of the Eighth Circuit's decision, this Court construed the relevant statutory section and expressly reinstated a related rule – Rule 315(b). On remand, the Eighth Circuit reheard the issue of the validity of Rules 315(c)-(f) to determine whether its prior ruling was consistent with this Court's intervening decision. Had the Eighth Circuit reinstated those rules, there would be no question that the incumbent LECs could seek review. It is plainly not the case that review should be denied only because the incumbent LECs, rather than the FCC and its supporting intervenors, happened to prevail.[6/]

c. Verizon also asserts that this issue does not warrant review because it is not important. That is not so. Verizon asserts that the issue is unimportant because it believes that collocation provides an adequate way for the new entrants to combine elements. The FCC, however, has disagreed. In the *Local Competition Order*, the FCC concluded that, whether on the floor or in a collocation cage, "in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the

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6/ This Court similarly invalidated Rule 319, but did not invalidate Rule 317 which was related. The incumbent LECs argued vigorously that the Eighth Circuit should reconsider its decision to uphold Rule 317 in light of the Supreme Court's decision. The court did so, and invalidated Rule 317. The incumbent LECs surely do not suggest that if the court had not done so, they would have been powerless to raise that issue in their petition.

incumbent."[7/] The incumbents cannot simply assert away that finding.

d. Finally, Verizon asserts that the Eighth Circuit was correct. Because a square conflict exists, that contention is irrelevant at this stage. In any event, the Eighth Circuit's decision was not correct. In *AT&T*, this Court squarely rejected the argument that, in requiring the incumbent to provide network elements in a manner that "allows requesting carriers to combine" them, Congress contemplated the provisioning of elements *only* in physically separate pieces. Although the Act "assuredly contemplates that elements may be requested and provided in this form," this Court held, "it does not say or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T Corp.*, 525 U.S. at 394. On remand, the Eighth Circuit nonetheless invalidated Rules 315(c)-(f) "[u]nder the first prong of Chevron," reasoning that "Congress has directly spoken on the issue of who shall combine previously uncombined elements. It is the requesting carrier who shall 'combine such elements.'" Pet. App. 22a-23a. Thus, the Eighth Circuit concluded, the plain language of the Act prohibits any FCC rule other than one requiring incumbents to provide access to unbundled network elements *only* in separated fashion and never in combined form, unless such elements already existed in combined form in the incumbent's network. *Id.* That decision is hopelessly in conflict with this Court's reading of 47 U.S.C. § 251(c)(3). This Court should therefore grant review and uphold Rules 315(c)-(f).

3. In our petition, we also demonstrated that the Eighth Circuit's decision invalidating the FCC's wholesale discount rate rule warrants review. The incumbent LECs raise three arguments in response: that the issue is insignificant, that the

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7/ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, ¶ 293 (1996).

Eighth Circuit was correct, and that there is no conflict among the circuits. The first two of these contentions are flatly wrong; the third is wholly irrelevant.

a. The incumbents make no attempt to refute the most fundamental assertion raised in our petition with respect to this issue: that as a result of the Eighth Circuit's decision, the wholesale discount rates contained in interconnection agreements throughout the country will be invalidated, and resale will cease to be a viable method of entry into the local telephone markets. Pet. at 28. Nor do they grapple with our argument that the Eighth Circuit's decision will not only frustrate Congress's intent to foster resale as one of the three statutorily recognized routes of entry into the local markets, but will effectively nullify it.

Instead, the incumbents maintain that the Court should conclude that the issue is insignificant because the FCC did not raise it in its own petition for certiorari. Verizon Opp. at 25-26. But the FCC has now made clear that, in its view (i) the Eighth Circuit's invalidation of Rule 609 presents an issue of "considerable importance," Br. of the FCC at 20, (ii) the Eighth Circuit's decision was wrong as a matter of law, *id.* at 18-19, and (iii) it would be entirely appropriate for the Court to review and reverse that decision, *id.* at 20. In light of these clear statements, the incumbents' suggestion that the Court should infer the opposite from the FCC's petition must be rejected.

The incumbent local exchange carriers also suggest that WorldCom itself has declared that resale is unimportant, relying on a declaration of a WorldCom witness in an unrelated administrative proceeding. Verizon Opp. at 26 & n.21. But far from showing that resale is not relevant to local competition, that declaration makes clear that local competition in Massachusetts through resale is 10 to 20 times *greater* than through the leasing of unbundled elements. *See id.* (citing Declaration of A. Daniel Kelley ¶¶ 10-11). The declaration further emphasizes the need for appropriate wholesale rates

nationwide, noting that resale rates in Massachusetts are "more reasonable" than in other states because the state commission there "followed the [Federal Communication] Commission's resale rules more closely than in other states." Declaration of A. Daniel Kelley ¶ 11. The incumbents' reliance on this declaration to attempt to minimize the national importance of the Eighth Circuit's invalidation of the FCC's wholesale rate rule is thus puzzling, at best.

b. Second, the incumbent LECs contend that review is not warranted because the Eighth Circuit's decision was correct. Verizon Opp. at 27-28. In doing so, however, the incumbents support a decision that the Eighth Circuit did not write.

The Eighth Circuit vacated Rule 609 because, in its view, the rule's focus on costs that *reasonably can be avoided* by the ILEC could not be squared with the statutory phrase "costs that *will be avoided*" by the ILEC. Pet. App. 14a-16a (emphasis added). The incumbent LECs make no attempt to defend that conclusion. Instead, they focus solely on a single sentence in which the Eighth Circuit appeared to reject the FCC's allocation of retail costs to retail rates and wholesale costs to wholesale rates. *Id.* 16a.[8/] According to the incumbents, "the Eighth Circuit held only that the statutory language [of Section 252(d)(3)] cannot be interpreted to refer to costs that the incumbent LEC would avoid if it entirely withdrew from retail." Verizon Opp. at 27. But that did not form the basis of the Eighth Circuit's invalidation of Rule 609 – which itself makes no mention of the "retail exit" assumption. Pet. App. 14a-16a.

8/ To determine which categories of costs are associated with retail and which with wholesale, the FCC employed a "retail exit" assumption. Under this assumption, any costs an incumbent would incur if it stopped acting as a retailer are included in the wholesale rate, because those costs could not reasonably be avoided when the incumbent acts as a wholesaler. This plainly does not mean that the FCC mistakenly concluded that the incumbent would stop engaging in retail activities altogether.

As Petitioners have explained – and the incumbents do not contest – under the Eighth Circuit's erroneous interpretation of the Act, a state commission would have no alternative in setting wholesale rates but to accept the incumbent's representations of the costs it will choose to avoid, even if it willfully refuses to avoid no costs at all. Pet. at 30. This would lead to prohibitively high wholesale rates that would foreclose resale as a viable entry strategy altogether. *Id.* For this reason alone, review is warranted.

c. Finally, the incumbents argue that review is not warranted because there is not a conflict among the *circuits* over the proper interpretation of section 252(d)(3) of the Act. Verizon Opp. at 28. But that should not serve as a basis for denying review where, as here, the court of appeals' decision (i) is flatly at odds with the national consensus of both federal courts and state commissions, Pet. at 28-29 & n.10, (ii) addresses a matter of federal law that is of extreme importance to the regulated industry and to the public, Pet. at 27-29, and (iii) is patently wrong, Pet. at 29-30. *See* Sup. Ct. R. 10.1(c); Robert Stern, *et al.*, *Supreme Court Practice* 184-85, 187-89 (7th ed. 1993).

The incumbents' assertion that issuance of new FCC rules based on the Eighth Circuit's decision will preclude the possibility of conflicts in the future, Verizon Opp. at 28, actually highlights the need for review at this stage. The Eighth Circuit's decision will thwart Congress's goal of bringing competition to local markets as soon as possible. If that decision stands and if the FCC issues new regulations that implement it, an erroneous ruling of a single court of appeals will be codified nationally. Thus, review of this issue, in this Court, at this time, is critical to effectuate Congress's intent to open local telephone markets to competition as quickly as possible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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